IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

TULSA LITHO COMPANY,
an Oklahoma corporation,

Plaintiff,

-vs-

TILE AND DECORATIVE SURFACES MAGAZINE PUBLISHING, INC.,
a California corporation;
DIMENSIONAL STONE INSTITUTE, INC.,
a California corporation;
CONTEMPORARY DIALYSIS INCORPORATED,
a California corporation and
JERRY FISHER,

Defendants.

No. 93-C-470E

JUDGMENT

This cause came on for trial before the Court and a jury, Honorable James O. Ellison, District Judge, presiding. The issues were duly tried and the jury rendered its verdict, which was accepted by the Court on May 4, 1994.

It is therefore Ordered and Adjudged that the Plaintiff, Tulsa Litho Company, have judgment against and recover from the defendants, Tile and Decorative Surfaces Magazine Publishing, Inc., Dimensional Stone Institute, Inc. and Contemporary Dialysis, Incorporated, jointly and severally, the sum of $326,000.00, with interest thereon as provided by law and the costs of this action.

Dated this 9th day of May, 1994.

James O. Ellison
~~Clerk of the Court~~
Judge, U S Dc

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KNOTTS MOTORS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 92-C-803-E
	)	
GRAND RIVER DAM AUTHORITY,	)	
	)	
Defendant.	)	

VOLUNTARY STIPULATION OF DISMISSAL WITHOUT PREJUDICE

The parties pursuant to Rule 41(a)(1)(ii) stipulate to the dismissal of the above styled and numbered cause of action without prejudice.

Thomas J. McGeady, One of the Attorneys for Plaintiff

John R. Woodard, III #9853, One of the Attorneys for Defendant

John R. Woodard, III, Esq.
Feldman, Hall, Franden,
Woodard & Farris
525 South Main, Suite 1400
Tulsa, OK 74103 4409
918/583-7129

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAYNE F. BOWMAN,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 92-C-212-E

ORDER

This order pertains to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and Motion for Award of Court Costs (Docket #10).[1] On January 25, 1994, this court issued a final order reversing the action of the Social Security Administration, finding Plaintiff disabled, and ordering that benefits be paid accordingly. The Plaintiff now seeks attorney fees in the amount of $2,448.23 pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1).[2]

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[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

[2] Title 28 of the United States Code, §2412(d)(1), states:

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.
>
> (C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny

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Under § 2412(d)(1), once a plaintiff establishes that he is the prevailing party, the burden rests with the government to prove that it was substantially justified in arguing, in this case, that the ALJ's decision was supported by substantial evidence. Weakley v. Bowen, 803 F.2d 575, 577 (10th Cir. 1986). "The standard under which substantial justification is scrutinized, set out in the EAJA's legislative history and cited by most courts addressing the issue, is that of 'reasonableness in both law and fact.'" Id. (citing Wyoming Wildlife Federation v. United States, 792 F.2d 981, 985 (10th Cir. 1986)).

The controlling question here then is whether the government was reasonable in arguing that there was substantial evidence that the surgery would restore Mr. Bowman's ability to work. The government has not presented any argument on this issue in its Response to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and Motion for Award of Costs (Docket #12).

In reversing the ALJ's decision that Plaintiff had the residual functional capacity to perform the full range of medium work during the relevant time period, the court concluded that there was no evidence that Plaintiff could work, with or without prescription medication. The doctors simply did not say whether or not he could. The record was replete with evidence that he suffered constant back pain for years and managed to work, but finally had to stop in 1983. No medical evidence refuted his testimony as to these facts. He took large amounts of pain relievers with adverse consequences and gradually curtailed his daily activities. A nexus between his degenerative

---

an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

disc disease and his pain was shown. Significantly, the ALJ failed to demonstrate what jobs he could perform despite his pain and did not call a vocational expert to testify on this subject. The government's argument was based in large part on a comment of Plaintiff in December of 1986 and one of his sister in March of 1990 that he was still working (pg. 5 of the Memorandum Brief in Support of Defendant's Administrative Decision (Docket #7).

The government was not reasonable in arguing that there was substantial evidence that Plaintiff could perform the full range of medium work during the relevant period. A fee award pursuant to the EAJA is appropriate.

Plaintiff's counsel requests $120.90 per hour for his representation of Plaintiff in this case. The EAJA prescribes a statutory rate of $75.00 per hour "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). Plaintiff's attorney states that there has been an increase in the cost of living since the EAJA was enacted in October of 1981 which justifies a higher fee in this case. Counsel has documented 20.25 hours of time spent on it, which is reasonable for such work. Plaintiff's counsel is entitled to receive an hourly fee of $120.90 for his twenty and one quarter hours of work in this case, or $2,448.23.

Attorney's fees are also proper under the Social Security Act, 42 U.S.C. § 406(b)(1) (1982), which provides:

> Whenever a court renders a judgment favorable to a claimant under this title . . . who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due

benefits to which the claimant is entitled by reason of such judgment . . . .

Congress made clear in the 1985 reenactment of the EAJA that cases falling within the fee provision of the Social Security Act may also be subject to EAJA. "To prevent double payment of fees for the same work under both statutes, however, Congress directed that the smaller amount be given to the client, since the Social Security Act fee award reduces the client's recovery of past due benefits. See H.R. Rep. No. 120, 99th Cong. 1st Sess. 20 (1985), U.S. Code Cong. & Admin. News 1985, pp. 132, 148." Weakley, 803 F.2d at 580. If Plaintiff's counsel has requested and received an award of fees under § 406(b)(1), he is to pay that fee, or the $2,448.23, if it is the smaller of the two, to his client.

Dated this 6th day of May, 1994.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Bowman.or
ctck

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CALVIN H. McKINNEY,

Plaintiff,

vs.

AMERICAN AIRLINES, INCORPORATED,

Defendant.

Case No. 93-C-547-E

STIPULATION OF DISMISSAL WITH PREJUDICE

Come now Plaintiff Calvin H. McKinney and Defendant American Airlines, Inc. through their respective attorneys and, pursuant to Rule 41(a)(1), hereby stipulate that the above-entitled cause be dismissed with prejudice.

Ronald D. Cates, OBA #1565
Suite 680, ParkCentre
525 South Main
Tulsa, Oklahoma 74103
(918) 582-7447

ATTORNEY FOR PLAINTIFF

Deirdre O. Dexter, OBA #10780
David R. Cordell, OBA #11272
CONNER & WINTERS, A Professional Corporation
2400 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4391
(918) 586-5711

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

TULSA LITHO COMPANY,
an Oklahoma corporation,

Plaintiff,

-vs-

TILE AND DECORATIVE SURFACES MAGAZINE PUBLISHING, INC.,
a California corporation;
DIMENSIONAL STONE INSTITUTE, INC.,
a California corporation;
CONTEMPORARY DIALYSIS INCORPORATED,
a California corporation and
JERRY FISHER,

Defendants.

No. 93-C-470E

ORDER

During the course of the trial of this cause to a jury there have been various motions made. The court has previously ruled on evidentiary matters and reaffirms those rulings. At the close of plaintiff's evidence and at the close of the evidence presented by both parties, the court took under advisement certain motions and submitted the case to the jury for decision. Particularly, the court took under advisement various motions by the defendants for dismissal, directed verdict and/or limitation of damages.

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It is Ordered that all motions taken under advisement during the trial of this cause be overruled and that judgment, on the verdict, be entered by the clerk. It is so ordered this 9th day of May, 1994.

James O. Ellison, Chief Judge

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,

Plaintiff,

v.

AMERICAN AIRLINES, INC., Et., Al.,

Defendants.

Consolidated Cases Nos.

89-C-868-B
~~89-C-896-B~~
90-C-859-B

ORDER DETERMINING GOOD FAITH OF SETTLEMENT

Now on this 9th day of ~~March~~ May 1994, this matter comes on for consideration of the Plaintiff Atlantic Richfield Company's (ARCO'S) NOTICE OF MOTION AND MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT (docket no. 1006) filed herein on September 9, 1993. The Plaintiff ARCO appears by its attorney, Larry Gutterridge, the Defendants appears by their respective lead counsel, and William Anderson appears as liaison counsel. The Court having examined the files and records and proceedings herein, having reviewed and considered the terms and conditions of the settlements in question, having reviewed and considered the Magistrate's Report and Recommendation, and being fully advised and informed in the premises FINDS and ORDERS as follows:

1. The Magistrate's Report and Recommendation pertaining the hearing on September 24, 1993, should be and is approved.

2. The Settlement encompassed by the Notice of Motion and Motion for Determination of Good Faith Settlement (docket no. 1006) in the above captioned action between the Plaintiff ARCO and

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Defendants Albert Equipment Company, Breene M. Kerr, Capital City Oil, Inc., Frank Smith, Fred Jones Ford of Oklahoma City, Fred Jones Ford of Tulsa, Frisco Railroad, Glenn Spees, J.A.Riggs Tractor Company, Marvin G. Spees, Moline Paint Manufacturing Co., URE Company, and Western Company of North America, Inc. ("Settling Parties") is found to have been entered into in good faith, and all claims against the Settling Parties for liabilities associated with the Site are barred under state and federal law, except to the extent that such claims are preserved by the Settlement.

Dated: 5-9-94

Thomas R. Brett
United States District Court Judge

Presented by:

Alan Au, Esq.
Attorney for Plaintiff,
Atlantic Richfield Company

John H. Tucker, Esq.
Lead Counsel
for Group IV

AXA94A15.SEL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KODAK ELECTRONIC PRINTING SYSTEMS, INC.,

Plaintiff,

vs.

ELECTRONIC PUBLISHING INFORMATION CONSULTANTS, INC.,

Defendant.

Case No. 93-C-1120-B

DEFAULT JUDGMENT

That whereas it has been made to appear to the undersigned Clerk, that a complaint was filed and summons was issued in this action, and said summons, together with a copy of said complaint, was served on the Defendant on December 20, 1993;

And it further appearing to the Court that no answer, motion to dismiss, or pleading has been filed by the Defendant, and that no extension of time to file pleadings has been granted, and that the time for pleading or otherwise defending has expired;

And it further appearing that Paragraph 3.7 of the Plaintiff's contract with the Defendant, attached as Exhibit A to the Plaintiff's Complaint, provides that the Plaintiff shall recover interest at the rate of 18.00% per annum on past due amounts;

And it further appearing to the Court that the default of Defendant has been entered according to the Federal Rules of Civil Procedure. Upon the request of the Plaintiff, Judgment is hereby entered against the Defendant in pursuant of the prayer of said complaint.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff shall be and is granted judgment against the Defendant in the amount of $247,039.50, with interest at 18.00% per annum from August 7, 1992 until the date of this judgment, and interest thereafter at the rate of 4.51% per annum, and costs.

This the 6th day of May, 1994.

Richard M. Lawrence
U.S. Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 9 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DONNA WALKER,

Plaintiff,

vs.

UNIFIRST CORPORATION, a Massachusetts Corporation, and FLOYD DENNIS JOHNSON,

Defendants.

Case No. 93-C-808-E

MAY 9 1994

STIPULATION OF DISMISSAL WITH PREJUDICE

The undersigned, counsel for the parties to this action, hereby stipulate pursuant to Rule 41(a) of the Federal Rules of Civil Procedure to the dismissal of this action with prejudice and stipulate that no costs, expenses, or attorneys' fees shall be assessed against either party(s).

This 9th day of May, 1994.

By: _____

Ralph Simon, OBA No. 8254
5700 E. 61st St., Ste. 103
Tulsa, Oklahoma 74136-2700
(918) 496-8008
COUNSEL FOR PLAINTIFF

By: _____

Timothy A. Carney, OBA No. 11784
Gable & Gotwals
2000 Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 586-8383
COUNSEL FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. CHARLES JUNIOR CHANDLER; THE FIRST NATIONAL BANK AND TRUST COMPANY OF VINITA, VINITA, OKLAHOMA; COUNTY TREASURER, Ottawa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma; State of Oklahoma ex rel. Oklahoma Tax Commission; Charles Angel; and Darlene Angel, Defendants.	CIVIL ACTION NO. 93-C-230-E

ENTERED ON DOCKET
DATE MAY 9 1994

FILED
MAY 9 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 4 day of May, 1994.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney

Wyn Dee Baker

WYN DEE BAKER, OBA #465
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

WDB/esf

NOTE: THIS ORDER IS TO BE MAILED [illegible] AND

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. CHARLES JUNIOR CHANDLER; THE FIRST NATIONAL BANK AND TRUST COMPANY OF VINITA, VINITA, OKLAHOMA; COUNTY TREASURER, Ottawa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma; State of Oklahoma ex rel. Oklahoma Tax Commission; Charles Angel; and Darlene Angel, Defendants.	CIVIL ACTION NO. 93-C-230-E

MOTION WITH MEMORANDUM BRIEF OF THE UNITED STATES TO DISMISS

The Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, pursuant to Rule 41(a)(2) moves the Court to dismiss this action without prejudice.

In support of this Motion the Plaintiff, United States of America, shows to the Court that the Defendant, Charles Junior Chandler, has made arrangements to pay the mortgage indebtedness of the United States.

Counsel for answering Defendants do not object to the granting of this motion.

WHEREFORE, the Plaintiff, United States of America, requests the Court to enter its Order dismissing this action

without prejudice. A proposed Order is submitted for the Court's consideration.

UNITED STATES OF AMERICA

STEPHEN C. LEWIS
United States Attorney

Wyn Dee Baker

WYN DEE BAKER, OBA #465
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of May, 1994, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

Charles Junior Chandler
P.O. Box 212
Cadet, MO 63630

The First National Bank
and Trust Company of Vinita, Vinita, Oklahoma
P.O. Box 407
Vinita, OK 74301

Wesley E. Combs
Assistant District Attorney
102 E. Central, Ste. 301
Miami, OK 74354

Kim D. Ashley
Assistant General Counsel
P.O. Box 53248
Oklahoma City, OK 73152-3248

Darlene Angel
1601 E. N.W.
Miami, OK 74354

Wyn Dee Baker

Wyn Dee Baker
Assistant United States Attorney

WDB/esf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. CHARLES JUNIOR CHANDLER; THE FIRST NATIONAL BANK AND TRUST COMPANY OF VINITA, VINITA, OKLAHOMA; COUNTY TREASURER, Ottawa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma; State of Oklahoma ex rel. Oklahoma Tax Commission; Charles Angel; and Darlene Angel, Defendants.	CIVIL ACTION NO. 93-C-230-E

MAY 9 1994

FILED

MAY 9 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 4 day of May, 1994.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney

Wyn Dee Baker

WYN DEE BAKER, OBA #465
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

WDB/esf

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND UNREPRESENTED PARTIES UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE O'BANNON BANKING COMPANY,

Plaintiff,

v.

ZINKLAHOMA, INC., formerly JOHN ZINK COMPANY, and THE FIRST NATIONAL BANK IN DOLTON,

Defendants,

v.

RMP CONSULTING GROUP, INC.,

Third-Party Defendant, and Third-Party Plaintiff,

v.

RMP SERVICE GROUP, INC., and KOCH ENGINEERING COMPANY, INC.,

Third-Party Defendants.

Case No. 90-C-987-E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Defendant, Zinklahoma, Inc., formerly John Zink Company, and Third Party Defendants, RMP Consulting Group, Inc. and RMP Service Group, Inc., by and through their undersigned counsel of record, and pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, stipulate to a dismissal with prejudice of all claims between the parties in the above captioned action. Each party will bear their own costs and attorney fees.

DATED April 29, 1994.

ZINKLAHOMA, INC.

By _____
Joon M. Imel, OBA #4542
Steven A Stecher, OBA #8574
MOYERS, MARTIN, SANTEE,
IMEL & TETRICK
320 South Boston, Suite 920
Tulsa, Oklahoma 74103-3722
(918) 582-5281

RMP CONSULTING GROUP, INC.
RMP SERVICE GROUP, INC.

By _____
Jim D. Loftis, OBA #13997
James L. Menzer, OBA #12406
LOFTIS & MENZER, P. C.
301 East Eufaula
Norman, Oklahoma 73069
(405) 366-1400

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHELLE L. COZART,

Plaintiff,

v.

NORTH WINDS NURSING CARE, INC.; KELLI WALLACE; and WILLIAM E. WALLACE,

Defendants.

Case No. 93-C-940B

ORDER

UPON the Joint Stipulation for Partial Dismissal with Prejudice filed by Plaintiff and Defendants, it is hereby

ORDERED, that Plaintiff's Complaint, and all claims asserted or which could have been asserted therein, are hereby DISMISSED as to Defendants Kelli Wallace and William E. Wallace only, with prejudice to refiling. Plaintiff retains all claims asserted herein against Defendant North Winds Nursing Care, Inc., which shall proceed to trial.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

05044.01/6705.03

ENTERED ON DOCKET

DATE MAY 06 1994

FILED
MAY 05 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRAIG FRANKLIN GRIDER and JACKIE D. GRIDER, his wife,

Plaintiffs,

v.

GRANT WILLIAM RANKIN and COVENANT TRANSPORT, INC.,

Defendants.

No. 93-C-186-B

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 5 day of May, 1994, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

/s/ THOMAS R. BRETT

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JUAQUIN LOZANO,

Plaintiff,

v.

WHIRLWIND, INC.,

Defendant.

92-C-1041-B

JUDGMENT

This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

It is therefore ordered that judgment is entered in favor of the defendant, Whirlwind, Inc., and against plaintiff, Juaquin Lozano.

Dated this 4th day of May, 1994.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PERMA-JACK COMPANY, et al. Plaintiffs, v. PERMABILT BY BRIGHT, INC., d/b/a Bright's Perma Built, et al. Defendants.	)	No. 93-C-950-B

STIPULATION OF DISMISSAL

This matter having been settled by written agreement of the parties, it is hereby further agreed that all claims of plaintiff are hereby dismissed with prejudice. The Court shall retain jurisdiction over this matter, if needed, to enforce the terms of the settlement agreement. Each party shall bear its own costs and attorneys' fees.

Respectfully submitted,

SENNIGER, POWERS, LEAVITT & ROEDEL

By _____

J. Bennett Clark
Robert M. Evans, Jr.
One Metropolitan Square
16th Floor
St. Louis, Missouri 63102
(314) 231-5400

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By _____
Leonard I. Pataki, #6935
Jon E. Brightmire, #11623
320 South Boston Avenue
Suite 500
Tulsa, Oklahoma 74103-3725
(918) 582-1211

Attorneys for Plaintiffs

CROWE & DUNLEVY
A Professional Corporation

By _____
Clyde A. Muchmore, Esq.
John J. Griffin, Jr., Esq.
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

DOUGLAS L. BOYD
1717 East Fifteenth Street
Tulsa, Oklahoma 74104-4636
(918) 742-9580

Attorneys for Defendants

* * *

S/ THOMAS R. BRETT

SO ORDERED: _____
United States District Judge

4-5-94
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 89-C-868-B
	)	89-C-869-B
AMERICAN AIRLINES, INC., et al.,	)	89-C-859-B
	)	
Defendants.	)	

J U D G M E N T

Pursuant to this Court's Order Granting Motion for Good Faith Determination and Entry of Contribution Bar on ARCO/United States Settlement, filed April 15, 1994, Plaintiff Atlantic Richfield Company's claims against the United States in the above styled actions are hereby dismissed with prejudice.

IT IS SO ORDERED, this 4th day of May, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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DATE 5/5/94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 4 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BOBBY G. APPLEMAN,

Plaintiff,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant.

No. 93-C-540-B

STIPULATION OF DISMISSAL WITH PREJUDICE

The undersigned, counsel for the parties to this action, hereby stipulate pursuant to Rule 41(a) of the Federal Rules of Civil Procedure to the dismissal of this action with prejudice and stipulate that no costs, expenses, or attorneys' fees shall be assessed against either party(s).

This 2 day of May 1994.

RALPH SIMON, OBA #8254
5700 East 61st, Suite 103
Tulsa, OK 74136-2700
(918) 496-8008
COUNSEL FOR PLAINTIFF

CHARLES J. SCHARNBERG, OBA #7941
800 North Harvey, Room 310
Oklahoma City, OK 73102
(405) 291-6756
COUNSEL FOR DEFENDANT

IT IS SO ORDERED THIS 4th DAY OF MAY 1994.

S/

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

H. DALE BARRICK, EDDIE JAY HUTTON, L. D. HULL, JACK D. MORGAN, and VIRGIL PRATT,

Plaintiffs,

vs.

OKLAHOMA GAS AND ELECTRIC COMPANY, an Oklahoma corporation,

Defendant.

Case No. 93-C-923-E

O R D E R

Now before the Court is the Motion to Remand (Docket #7) of the Plaintiffs, H. Dale Barrick, Eddie Jay Hutton, L.D. Hull, Jack D. Morgan, and Virgil Pratt.

Defendant, Oklahoma Gas & Electric Company (OG&E), removed this breach of contract claim to Federal Court, asserting that the action relates to an employee benefit plan, which is governed and regulated by federal statute, 29 U.S.C. §1001, et seq., Employee Retirement Income Security Act (ERISA). Plaintiffs moved to remand, asserting that there is no federal question jurisdiction because their claim does not "relate to" an employee benefit plan.

In the Petition, filed in state court, Plaintiffs assert that "[s]ometime in the first Quarter of 1987, the Plaintiffs requested that they retire from their employer, Defendant OG&E, effective April 1, 1987." Plaintiffs further assert that the Policies and Procedures Manual of OG&E constituted an implied or express written contract of employment, and that the manual provided for maintaining "proper lines of communication by keeping management and subordinate members informed and reflecting an atmosphere of

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open and unbiased interaction." Plaintiffs allege that OG&E breached this contract by failing to inform them of a "planned work force reduction which could have an economic impact on the Plaintiffs." In their Motion to Remand, Plaintiffs specifically assert that they "retired earlier than they would have if they had known of the planned work force reduction, and as a result, suffered damages, including lost wages and the loss of an opportunity to become a participant in a new amended retirement plan that was put into effect shortly after plaintiffs retired." (Motion for Remand and Brief in Support, p. 2) Plaintiffs also assert that "OG&E discussed extensively but delayed any final action on the work force reduction, and a decision to offer enhanced retirement benefits, until just after the plaintiffs had retired--depriving them of the open communication as well as the opportunity of being kept informed which was promised to them in writing in the manual." (Motion for Remand and Brief in Support, pp. 2-3)

An action alleging only state law claims is removable to federal court if the claims are subject to the defense of ERISA preemption. Settles v. Golden Rule Ins. Co., 927 F.2d 505 (10th Cir. 1991)(citing Metropolitan Life Insurance Co. v. Taylor, 107 S. Ct. 1542 (1987)). A claim based on state law is preempted if it relates to an employee benefit plan. 29 U.S.C. §1144(a) provides in pertinent part: "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee

benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." In Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478 (1990), the Court held that a claim that an employee was wrongfully terminated because of the employer's desire to avoid payments under a benefit plan "relates to" an ERISA plan and was therefore preempted. The Ingersoll Court noted that a law "relates to " a benefit plan if it has a connection with or reference to such a plan, that the term "relate to" should be interpreted broadly, and that a law may "relate to" a benefit plan even if the law is not designed to affect benefit plans or the effect is only indirect. Id., at 483 (citations omitted).

The Tenth Circuit has held that a claim relates to an employee benefit plan and is preempted "if the factual basis of the cause of action involves an employee benefit plan." Settles, 927 F.2d at 509. Here, contrary to the arguments of Plaintiffs, their claim is factually dependent on the amended employee benefit plan. In fact, it is the amended employee benefit plan that Plaintiffs assert that OG&E did not communicate to them in violation of their employment contract. Thus, the claim relates to an employee benefit plan, and is preempted by ERISA.

Plaintiffs argue that their claim is not preempted because they may not properly pursue any ERISA claims against the defendant based on the amended plan which is the subject of this action, because they are not participants in or beneficiaries of the amended pension plan, and because their claim does not relate to a

benefit plan. In effect, Plaintiffs admit that they have no ERISA claim (and are not making an ERISA claim because they are not participants, are not suing the plan, and are not seeking benefits under the plan), and therefore the contract claim is not preempted. This assertion is incorrect. See e.g. Straub v. Western Union Telegraph Co., 851 F.2d 1262 (10th Cir. 1988)(plaintiff's state law claims were preempted and plaintiff's factual allegations did not state a claim for relief under ERISA); Settles, 927 F.2d at 509 (plaintiff's claims were preempted even though plaintiff was not seeking benefits under the plan or suing the plan); Sanson v. General Motors Corp., 966 F.2d 618 (11th Cir. 1992)(plaintiff's claims were preempted even though he could not state a claim under ERISA).

Lastly, Plaintiffs urge this Court to adopt the reasoning of the Court in Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989), and the dissent in Sanson, 966 F.2d at 623, and find that their claim does not relate to an employee benefit plan. However Plaintiffs claim does "relate to" an employee benefit plan as that phrase has been interpreted by the Tenth Circuit.

Plaintiff's Motion to Remand is Denied for the reason that Plaintiffs' claim is preempted by ERISA, and because Plaintiffs' claim for breach of contract is preempted, it is dismissed.

IT IS SO ORDERED THIS 4th DAY OF MAY, 1994.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LMS HOLDING COMPANY, et al,	)	
	)	
Debtors,	)	
	)	
LMS HOLDING COMPANY, et al,	)	
	)	
Appellants,	)	
	)	
v.	)	93-C-0531-E
	)	
CORE-MARK MID-CONTINENT, INC.,	)	
	)	
Appellees.	)	

ORDER

Appellants Retail Marketing Company "RMC" appeals from a decision by the United States Bankruptcy Court for the Northern District of Oklahoma.[1] Appellants raise two issues: (1) Whether the Bankruptcy Court erred in holding that the Mako Security Interests attached to the RMC inventory pursuant to Section 9-306(2) of the Uniform Commercial Code ("UCC") and (2) Whether the Bankruptcy Court erred in holding that the Mako security interests were perfected as to the RMC Inventory pursuant to Section 9-402(7) of the UCC. For the reasons discussed below, the Bankruptcy Court's decision is reversed.

I. Summary of Facts and Procedural History

In 1988, MAKO, a chain of convenience stores, gave Coremark and Amcon ("Appellees") a security interest in its inventory, after-acquired inventory and inventory

[1] *Appellants are properly styled as LMS Holding Company, Petroleum Marketing Company and Retail Marketing Company.*

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proceeds.("MAKO Inventory").[2] Appellees perfected their security interest by properly filing a financing statement naming MAKO as the debtor.[3] MAKO subsequently filed bankruptcy.

During the bankruptcy proceeding, a "MAKO Plan" provided that Coremark and Amcon would retain their liens in the Mako Inventory. The Plan also allowed Appellant Retail Marketing Company ("RMC") to buy the MAKO Inventory -- the same inventory of which Appellees had a perfected security interest.[4] RMC then gave Appellees a Plan Note and a security agreement that secured the Plan Note with the MAKO Inventory.[5]

After executing the notes to the Appellees, RMC sold the MAKO Inventory in the regular course of business. The proceeds from the sale were then commingled with RMC assets. Sometime thereafter, RMC filed bankruptcy, still indebted to Appellees. One the bankruptcy proceeding began, RMC filed a Complaint To Avoid Liens, To Disallow Claims and To Avoid and Recover Certain Transfers. RMC asserted that, since Appellees did not file a new Financing Statement or "otherwise perfect its security interest granted in the MAKO Plan against RMC's assets", Appellees' security interest against RMC assets was

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[2] *The facts are taken from Stipulations of Fact Concerning Debtors' Complaint To Avoid Liens of Core-Mark, Mid-Continental, Inc. and Amcon Distributing Company Regarding After-Acquired Inventory (filed of record April 9, 1993).*

[3] *Appellees also filed financing statements naming MAKO as the debtor to perfect their security interests in certain inventory, after-acquired inventory and proceeds. The type of "inventory" at issue is not specifically stated in the record. However, it appears to be dry goods.*

[4] *Coremark and Amcon had notice of the MAKO bankruptcy, participated in its administration and did not object to the confirmation of the MAKO plan. The plan was confirmed by the Bankruptcy Court in August of 1989. After the plan's confirmation, Coremark and Amcon received from RMC a "Plan Note" and a security agreement that secured the Plan Note with the MAKO inventory. Coremark received a Plan Note from RMC for $175,000; Amcon received a Plan Note from RMC for $106,000. Neither Coremark or Amcon filed a UCC-1 Financing Statement or other evidence of its respective security interest or lien in the MAKO inventory naming RMC as the owner thereof. Stipulations of Fact, page 4.*

[5] *Coremark received a note from RMC for $175,000. Amcon received a note for $106,000.*

unperfected.[6]

The Bankruptcy Court, however, rejected that argument. It found that Sections 9-306(2) and 9-402(7) of the Uniform Commercial Code protected the Appellees' security interests against the RMC assets. **"By definition"**, wrote the Bankruptcy Court, **"collateral includes the property subject to a security interest which in this case includes future-acquired inventory. These two sections [306(2) and 402(7)] carry forward and protect the 'floating lien' without the need for new security agreements and new perfection after a transfer. This should be particularly true where the debtor purchases the inventory from the original owner expressly subject to the liens of the creditors."** *Id. at page 4.*[7] *Supplemental Memorandum Opinion, May 28, 1993.*

II. Legal Analysis

At issue is whether Appellees had a perfected security interest in RMC's assets once RMC sold the MAKO Inventory and commingled the proceeds.[8] Stated another way, Appellees had a perfected security interest in the MAKO Inventory by virtue of the their financing statement. However, once RMC sold the MAKO Inventory, were Appellees required, under 9-402(7) of the Uniform Commercial Code ("UCC") to file a new financing statement identifying the RMC assets as collateral? The statute in question, 12A Okla. Stat. 9-402(7), states:

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[6] *If Appellees' security interest was unperfected, the Trustee (as the "hypothetical lien creditor") would be able to avoid Appellees' claims pursuant to 11 U.S.C. §544(a). In addition, RMC also requested that any transfer of payments from it to Amcon and Coremark should be avoided under Sections 547(b) and 550 of Chapter 11 of the United States Code.*

[7] *On June 4, RMC filed the instant appeal.*

[8] *The standard of review is de novo.* FDIC v. Oaklawn Apartments, *959 F.2d 170, 173 (10th Cir. 1992.)*

> A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership, or corporate name of the debtor, whether or not it adds other trade names or the names of the partners. Where the debtor so changes his name, or in the case of an organization, its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.(emphasis added)

The question here requires an interpretation of the third sentence.[9] The Bankruptcy Court relied on *In Re Taylorville Eisner Agency,* 445 F.Supp. 665 (S.D. Ill. 1977), in deciding that Appellees' financing statement encompassed not only the MAKO Inventory but the RMC assets.[10]

In *Taylorville,* the bank made a loan to individual debtors secured by fixtures, equipment, inventory and after-acquired property. The bank's security interest was perfected by the filing of a financial statement listing the individuals as debtors. On the same day the loan was made, the individuals transferred all of the collateral to a corporation they had previously formed. The corporation assumed the bank loan. Two years later, the corporation -- after selling the inventory that had been initially transferred -- went bankrupt. Since the bank had not filed a new financing statement, the trustee argued that the bank did not have a perfected security interest in the corporation's after-acquired inventory. The Bankruptcy Court ruled against the trustee.

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[9] *This case does not involve the second sentence of 402(7) as the original debtor has not changed his name or corporate structure.*

[10] *No one disputes that Appellees had a perfected security interest in the MAKO Inventory in the possession of RMC. However, as noted earlier, the MAKO Inventory was sold in the ordinary course of business by RMC. In addition, the proceeds from the sale of the inventory had been commingled by RMC prior to the bankruptcy filing. RMC did not do business with Amcon or Coremark after it acquired the MAKO Inventory. See April 9, 1993, Stipulations of Fact. Therefore, the question here is whether the financing statement encompassed RMC's inventory, after acquired inventory and inventory proceeds.*

> The third sentence [of 402-7] transfer situation is somewhat different. In the present case the transferee corporation clearly knew from the note and security agreement of the transferor debtor that the collateral, including after-acquired inventory and merchandise, was subject to a perfected security interest. The third sentence of Section 7 is clear that the filed statement remains effective with respect to collateral transferred by the debtor regardless of the knowledge or consent of the secured party. This also means collateral which is after acquired property. Prospective creditors of the transferor have a duty to inquire as to the source of title if circumstances dictate. *Id. at 669.*

The 1977 *Taylorville* decision, however, has received little support. *See, generally, In Re Meyer-Midway*, 65 B.R. 437,444 (Bankr. E.D. Ill 1986); *In Re Bluegrass Ford-Mercury*, 942 F.2d 381 (6th Cir. 1991) and *In Re Cohutta Mills*, 108 B.R. 815 (N.D. Ga. 1989). Consequently, this Court declines to follow *Taylorville.*

A logical analysis of the issue appears in *The Duty To Refile Under Section 9-402(7) of the Revised Article 9, 35 Business Lawyer 1083 (1980) by Mr. William Burke.*[11] The article sets forth a two-pronged analysis when collateral has been transferred to a new entity: First, did the security interest continue in the collateral upon transfer? Second, if the security interest survived the transfer, is any refiling required in the name of the transferee?

Mr. Burke acknowledges, as does this Court, that no refiling is necessary when the debtor disposes of collateral that remains in existence. In other words, in the case at bar, Appellees were not required to file a new financing statement as long as the MAKO Inventory existed. The question, however, is whether Appellees had to re-file once RMC disposed of the MAKO Inventory and commingled the proceeds. Writes Mr. Burke:

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[11] *When the article was published, Mr. Burke was the Chairman of the Committee on Uniform Commercial Code of the ABA Section on Corporation, Banking and Business Law.*

> With respect to new property acquired by the transferee, the secured creditor must establish both the existence of security interest in the property and perfection of the security interest. Assuming that the secured creditor can establish the existence of a security interest in the property acquired by the transferee, the last sentence of Section 9-402-7 clearly does not operate to perfect the security interest. The new property acquired by the transferee is by definition not "collateral transferred by the debtor" within the meaning of the last sentence of section 9-402(7); and a financing statement filed in the name of the transferor can not perfect a security interest in property acquired by the transferee. As to new property acquired by the transferee after the transfer, the secured creditor should obtain a new security agreement signed by the transferee and file a new financing statement signed by the transferee. (emphasis added)Id. at 1100.

Such an interpretation of 402-7 has been adopted by several courts. For example, *In Re Bluegrass Ford-Mercury, Inc.*, 942 F.2d at 381 involved circumstances similar to those to the instant case. The bank made a loan to a car dealership and perfected its security interest by filing a financing statement. The dealership was then sold to another dealership. The new dealership assumed the indebtedness of the old dealership by executing security agreements with the bank. However, the bank failed to file a new financing statement in the new dealership's name. The new dealership then filed bankruptcy. *Id. at 382.*

The bank argued that the financing statement filed in the name of Bluegrass Ford (the old dealership) perfected its interest in the after-acquired inventory of Bluegrass Mercury-Ford (the new dealership). The Sixth Circuit, however, rejected that argument.[12] "We do not interpret this language [the third sentence of 9-402(7)] to encompass collateral

[12] *The court discussed Section 9-306(2) of the Uniform Commercial Code, which states: "Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor." The court found that the bank's security interest in the Bluegrass Ford-Mercury continued after the transfer of Bluegrass Ford's inventory to Bluegrass Ford-Mercury's inventory. Id. at 386.*

not yet acquired by transferee debtor."*Id. at 387. Also, see, Meyer, supra* ("This Court agrees with the Trustee that the Bank would be obligated to file a revised financing statement to be perfected in new collateral or collateral intended to secure the bank under the after-acquired property clause.") and *Citizens Savings Bank v. Sac City State Bank,* 315 N.W. 2d 20 (Iowa 1982)("As to new property acquired by the transferee after the transfer, the secured creditor should obtain a new security agreement signed by the transferee and file a new financing statement signed by the transferee.")

In the case at bar, applying the aforementioned reasoning, Appellees were required to file a new financing statement naming RMC as the debtor and including RMC's "after acquired" or "new" property as collateral.[13] Their financing statement naming MAKO as the debtor and describing the collateral as MAKO's inventory, after acquired inventory and inventory proceeds was not sufficient to cover RMC's assets that were separate and apart from the MAKO Inventory.

This Court certainly realizes that one purpose of Article 9 is to provide certainty and protection of a secured party's interest in collateral. However, another purpose of a financial statement is to put third parties on notice that a security interest may exist in certain property. *In Re Little Brick Shirtholder,* 347 F.Supp. 827, 829 (N.D. Ill. 1972). The drafters wanted a system where a party searching the files could obtain information about a debtor's property and rely upon that information in making loans secured by such property. To accomplish this, financing statements generally must be filed under the

[13] *This Court finds that Appellee's security intent continued in the collateral upon transfer.*

debtor's name. A searcher will otherwise be unable to discover outstanding security interests. *In Re Southern Properties*, 44 B.R. 838, 843 (Bankr. E.D. Va. 1984).

The decision by the Bankruptcy Court, in effect, places a higher priority on the secured creditor's protection rather than the "notice" function to prospective creditors.[14] Yet, the undersigned thinks the better rule -- especially under these facts -- is to place the burden on the secured party to file a new financing statement. In this case, Appellees had knowledge of the collateral transfer, and, in fact, participated in the bankruptcy proceeding. As a result, it would have been much simpler for them to file a financing statement than to require prospective creditors to ferret through records in search of the liens.[15]

III. Conclusion

At issue is whether Appellees had a perfected security interest in the RMC assets. No mandatory precedent answers that question, but this Court finds Appellees did not have a perfected security interest in the RMC assets. RMC had disposed of the MAKO Inventory and commingled the proceeds; therefore, Appellees should have filed a new financing statement. Consequently, the Bankruptcy Court's decision is REVERSED.

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[14] *The Taylorville court also placed the burden on the creditor. It wrote: "In the instant case had any creditors checked the corporation's source of title they could have easily discovered the assumption of the notes which were in the individuals' names and by running a check on those names found the filed financing statements. This information appears to be more easily accessible to prospective creditors of the transferee than the secured party of the transferor debtor." Id. at 669.*

[15] *Equitably, neither party appears to deserve preferential treatment. RMC apparently sold the MAKO Inventory and commingled the proceeds into its own accounts. Coremark and Amcon, on the other hand, knew of the transfer and had the opportunity to file a new financing statement. They should have been aware, as is this Court, that no mandatory precedent exists on the 402(7) issue. In fact, the case law is inconsistent at best. Simply filing a new financial statement, under the circumstances, would have been a prudent decision.*

SO ORDERED THIS 4th day of May, 1994.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 5-4-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma Corporation,

Plaintiff,

vs.

JNR ASSOCIATES AUTO RENTING AND LEASING, INC., a foreign corporation; and JOHN M. MICHAEL, an individual.

Defendants.

Case No. 93-C-701-E

ORDER

Upon stipulation of all parties to the dismissal of this action with prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, such action shall be and hereby is dismissed with prejudice.

SO ORDERED this 3 day of May, 1994.

S/ JAMES O. ELLISON

United States District Judge

59203

ENTERED ON DOCKET

DATE 5-4-94

FILED

MAY 3 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMFAC DISTRIBUTION CORPORATION, Plaintiff,	)	
vs.	)	Case No. 93-C-1159-E
TUBULAR CORPORATION OF AMERICA, Defendant.	)	

NOTICE OF DISMISSAL

Amfac Distribution Corporation, pursuant to the provisions of Rule 41(a)(1)(i), Federal Rules of Civil Procedure, hereby files its Notice of Dismissal of the above referenced matter, such dismissal to be without prejudice to any subsequent refiling and such dismissal having been filed before service by the adverse party of an answer or of a motion for summary judgment.

DOERNER, STUART, SAUNDERS,
DANIEL, ANDERSON & BIOLCHINI

By: _____

James P. McCann
Jon E. Brightmire
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FARM CREDIT BANK OF WICHITA, a federally chartered corporation,

Plaintiff,

vs.

JACK B. SELLERS, et al.,

Defendants.

Case No. 89-C-1001-B

ORDER

Before the Court is the Report and Recommendation of Magistrate Judge John Leo Wagner wherein the magistrate recommends that the Court grant the motion of Marie C. Webber, Jefferson D. Sellers and Leslie R. Sellers to confirm sheriff's sale and enter the order confirming sale.

The matter was set for hearing before the magistrate. The magistrate found that the parties were properly noticed for the hearing. No person appeared to object to confirmation. The magistrate found that the sale was legally perfected.

No objection to the magistrate's Report and Recommendation has been filed. The Court has reviewed the record, and finds that the Report and Recommendation should be and hereby is affirmed and adopted as the findings and conclusions of this Court.

Filed simultaneously herein, is the Order Confirming Sheriff's Sale.

IT IS SO ORDERED on this 2nd day of May, 1994.

S/ THOMAS H. BRETT
UNITED STATES DISTRICT JUDGE

262301.017

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J. CHARLES F. GILLE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 90-C-468-E

ORDER

Now before the Court is the Motion for Attorney's Fees (Docket #69) and the Motion to Waive Rule (Docket #71) of the Plaintiff J. Charles F. Gille (Gille).

Gille prevailed in this action against the government for violation of 26 U.S.C. §7431 prohibiting unauthorized disclosure of tax returns and return information. Plaintiff, who represented himself throughout this action, now seeks attorney's fees in the amount of $71,633.44. Plaintiff seeks attorney's fees pursuant to 26 U.S.C. §7430 which provides for an award of reasonable litigation costs incurred in connection with a court proceeding to the prevailing party in any proceeding for the collection or refund of any tax, interest or penalty under title 26, U.S.C. Section 7430 defines reasonable litigation costs to include:

> (A) reasonable court costs, and
>
> (B) based upon prevailing market rates for the kind or quality of services furnished--
>
> > (i) the reasonable expenses of expert witnesses in connection with a court proceeding, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert

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> witnesses paid by the United States, (ii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and (iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding justifies a higher rate.

Plaintiff asserts that this provision is equally applicable to an award of attorney's fees for a pro se litigant. Plaintiff's authority, however, does not support this argument.

Plaintiff relies on Celeste V. Sullivan, 734 F.Supp. 1009 (S.D. Fla. 1990), wherein the awarded a pro se plaintiff $75 an hour for his time after attorneys refused to take his case on a contingency basis and he was unable to afford to retain an attorney in any other manner. However, Celeste deals with an award of attorney's fees under the Equal Access to Justice Act, and not §7430. Moreover, Celeste was reversed by a court that held that Equal Access to Justice Act permits no awards of attorney fees to pro se litigants. Celeste v. Sullivan, 988 F.2d 1069, 1070 (11th Cir. 1992).

Plaintiff also argues that the entitlement to attorney's fees under §7430 applies to pro se litigant because of §7430(c)(3) which provides:

> For purposes of paragraphs (1) and (2), fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court or before the Internal Revenue Service shall be treated as fees for the services of an attorney.

Plaintiffs reliance on this section is also misplaced. Under the language of the statute, fees for the services of an attorney can be awarded if the were "paid or incurred." In the instance of a pro se litigant there were no fees "paid or incurred" for an attorney. Section 7430 was drafted "to compensate only actual out-of-pocket expenses or debts which would have to be paid." U.S. v. McPherson, 840 F.2d 244, 245 (4th Cir. 1988). See also, McCormack v. United States of America, 891 F.2d 25 (2nd Cir. 1989).

Under the express language of §7430, Plaintiff is entitled to attorney's fees he paid or incurred. However, Plaintiffs motion for attorneys fees is devoid of any proof that he paid or incurred the fees that he seeks as a result of his representation of himself. Plaintiff's Motion for Attorney's Fees is denied. In light of this ruling, the Court finds that Plaintiff's Motion to Waive Rule[1] is moot.

IT IS SO ORDERED THIS 4TH DAY OF ~~APRIL~~ MAY, 1994.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

[1] In this motion, Plaintiff asks this Court to waive Local Rule 1E, regarding the time period for filing a Motion for Attorney's Fees. However, in light of the Court's finding that Plainitff is not entitled to attorney's fees, this motion is moot, and need not be addressed.

ENTERED ON DOCKET

5/2/94

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ISHFAQ A. KHAN,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ROGERS, STATE OF OKLAHOMA; DEWEY JOHNSON, an individual; J.J. GARBER, an individual; JIMMY JOHNSON, an individual; BRAD JAMES, an individual; NANCY LUPER, an individual; and JOHN DOES THREE Through TEN, Inclusive, and JANE DOES TWO Through TEN, Inclusive,

Defendants.

Case No. 93-C 665B

FILED

MAY 2 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

It is hereby stipulated by Plaintiff, Ishfaq A. Khan, and the Defendants Board of County Commissioners of the County of Rogers, Dewey Johnson, J.J. Garber, Jimmy Johnson, Brad James, Nancy Luper, John and Jane Does, that the above entitled action be dismissed without prejudice as to Defendants Jimmy Johnson, Brad James and John Does Three Through Ten, and Jane Does Two Through Ten only, with all parties to bear their respective attorneys fees and costs of the action.

Dated and Submitted: May 2, 1994.

HERROLD, HERROLD & DAVIS, INC.

By: _____

Marlin R. Davis, OBA #10777
210 ParkCentre
525 South Main Street
Tulsa, Oklahoma 74103-4503
(918) 592-4050
ATTORNEYS FOR PLAINTIFF

and

WILBURN, MASTERSON & SMILING

By: _____

Ray Wilburn, Esq.
Philard L. Rounds, Jr., Esq.
Scott Taylor, Esq.
Executive Center II
7134 S. Yale Avenue, Ste 560
Tulsa, OK 74136-6337
(918) 494-0414
ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BOVAIRD SUPPLY COMPANY, a Delaware corporation,

Plaintiff,

v.

TUBULAR SPECIALTIES, INC., a Texas corporation; YEGUA PRODUCTION COMPANY, a Texas corporation; and THOMAS D. GHOLSON, an individual,

Defendants.

CASE NO. 93-C-254-B

ORDER

This matter comes on for consideration of Plaintiff's Motion For Summary Judgment (docket entry #9), filed on December 13, 1993. After being granted several extensions within which to respond to Plaintiff's motion[1], Defendants filed, on April 22, 1994, their Pre-Trial Statement Of Intent Not To Defend, stating they do not intend to file a response to Plaintiff's motion.

The following undisputed facts appear from the record or are deemed admitted by Defendants' failure to respond. Local Rule 56.1.

The Court has jurisdiction of the parties and the subject matter herein. Venue is proper within the Northern District of Oklahoma.

Defendant Tubular Specialties, Inc. (TSI) and Yegua Production Company (Yegua) executed a promissory (demand) note to Plaintiff on

[1] The Court repeatedly was advised the parties were near settlement.

April 1, 1991 (at Plaintiff's place of business in Tulsa) in the amount of $1,713,264.22 with 15% interest thereon and 15% attorneys fees in the event of default. The note is in default. Thomas D. Gholson (Gholson) executed, on July 29, 1988, a personal guaranty of all indebtedness of TSI to Plaintiff.

As of December 13, 1993, the amount due and owing on said note is the sum of $1,711,764.22 plus interest at the rate of fifteen percent (15%) per annum from April 1, 1991.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

> "[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

> ". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

The Court concludes summary judgment should be and the same is hereby GRANTED in favor of Plaintiff and against Defendants. Judgment in favor of Plaintiff and against Defendants, in the amount of $1,711,764.22, with 15% interest thereon from April 1, 1991, until the date of judgment, and 15% attorneys fees, will be entered simultaneously herein.

IT IS SO ORDERED this 29th day of April, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAMES C. WALTON,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendant.

93-C-0183-E

ORDER

The Secretary of Health and Human Services denied Plaintiff James C. Walton's application for disability benefits under Titles II and XVI of the Social Security Act. Plaintiff now appeals that decision, raising two issues: (1)Whether the Secretary's decision is based on substantial evidence and (2) Whether the Administrative Law Judge ("ALJ") erred in his hypothetical questioning of the vocational expert.

I. Standard of Review

In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g).[1] The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A

[1] *Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

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finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. ***Trimiar v. Sullivan***, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. ***Smith v. Heckler,*** 707 F.2d 1284, 1285 (11th Cir. 1985).[2]

II. Legal Analysis

The first issue is whether substantial evidence supports the ALJ's finding of no disability.[3] Plaintiff contends that he is disabled due to seizures.[4] The ALJ concluded that Plaintiff could not return to his past relevant work as a cook supervisor, grocery stocker or a sacker, but found that Plaintiff could work as a cashier, desk clerk, reservation clerk, video rental clerk, shipping/receiving clerk.

Review of the record shows that the ALJ/Secretary's decision is supported by substantial evidence. At the time of the hearing before the ALJ, Plaintiff was 28 years old and had a high school education. During the hearing, Plaintiff testified that he was not

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[2] *When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends.* Gossett v. Bowen, *862 F.2d 802, 805 (10th Cir. 1988). Plaintiff was found to be* not *disabled at Step 5.*

[3] *Plaintiff cites* Channel v. Heckler, *747 F.2d 577 (10th Cir. 1984) for the proposition that the ALJ improperly relied on the grids. This Court finds that argument without merit. The ALJ relied, in part, on the testimony of a vocational expert in making his decision. In addition, the ALJ made a specific finding -- one supported by substantial evidence -- that Plaintiff could perform a full range of medium exertional activity limited only by an inability to work around unprotected heights and dangerous or fast moving machinery and the requirement of a loss stress occupation.* Record *at 37.*

[4] *On May 5, 1990, Plaintiff lost consciousness while driving a car. He was admitted into the hospital on what was diagnosed as a "grand mal seizure."*

able to work because of seizures and side effects from his medications. He also said that he also was hampered by "nerves", "memory problems", ulcers, kidney problems and migraine headaches.[5]

The medical evidence indicates that Plaintiff suffered a seizure in May of 1990. He was hospitalized, but discharged in stable condition. Dr. David Duncan, M.D., noted that the Plaintiff could go back to work on the "first following work day." *Record at 241.* Dr. Duncan also placed Plaintiff on Dilatin, Iron sulfate and Zantac. *Id.* Also, from May 14, 1990 to March 18, 1990, Plaintiff from time-to-time reported dizziness, weakness, numbness, headaches, vision problems and leg pain. *Id. at 209-239.*

Dr. Sasha Husain, M.D., a Board Certified Neurologist, performed an EEG on Plaintiff. On May 16, 1990, following the EEG, Dr. Husain wrote: "This is an abnormal EEG due to the presence of a sharp, sharp to slow wave activity which occurs in the form of a paroxysmal burst several times in this tracing. Findings are consistent with the diagnosis of seizure disorder." However, on August 21, 1990, Dr. Husain later ruled out a seizure disorder.[6]

On May 28, 1991, Dr. Ronald Passmore examined Plaintiff. Plaintiff told Dr. Passmore that, at work, his medicine made him dizzy, tired, blurry and forgetful. Wrote Passmore about his examination: "As long as he is not being stressed and staying at home, he apparently is free of symptoms. He reports symptoms only when he goes to work. I

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[5] *The ALJ found Plaintiff's testimony not to be credible, noting "troubling inconsistencies". Record at 37.*

[6] *Dr. Husain wrote: "The patient apparently had a definite seizure, which has witnessed. I will therefore feel more comfortable if he is on an anticonvulsant." Dr. Husain also noted that, on August 24, 1990, Plaintiff had not had any seizures, but been drowsy and "somewhat dizzy" due to his Dilantin level. The doctor instructed him to decrease the Dilatin. On October 16, 1990, Dr. Husain indicated that Plaintiff complained of being dizzy and losing balance. Dr. Husain stated that Plaintiff was unable to do tendon walking on October 16, 1990. Record at 258.*

think a lot of these symptoms could be controlled by medication, and he needs to have his medication changed, or he actually needs to be seen by a psychiatrist who would actually do some psychotherapy." *Id. at 264.*

On May 29, 1991, Dr. Gary Davis, M.D., examined Plaintiff. Dr. Davis stated that "it appears that his [Plaintiff's] seizures are under reasonable control...As far as disability is concerned, if the patient's seizures are controlled, there should be no reason that the patient could not be employable." *Id. at 269.*

In addition to the medical evidence, a Vocational Expert testified. In response to a hypothetical question by the ALJ, the Vocational Expert testified that Plaintiff could work as a cashier and in various clerking jobs.*Id. at 89.*[7]

The foregoing evidence supports the ALJ's decision that Plaintiff could return to work. While Plaintiff suffers from occasional seizures, medication side effects, drowsiness and dizziness, the medical evidence indicates that he can return to work. None of the doctors examining Plaintiff concluded that he cannot work. In fact, Drs. Davis and Passmore both stated that he could work. In addition, the Vocational Expert testified that Plaintiff can return to work. As a result, substantial evidence supports the ALJ's decision and the Secretary's decision is **AFFIRMED**

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[7] *Plaintiff contends the hypothetical question by the ALJ was "incomplete and misleading because said questions fail to take into account the Plaintiff's documented nonexertional impairments, i.e. dizziness, weakness, headaches and medication side effects." Plaintiff's Brief at page 7 (docket #8). See Hargis v. Sullivan, 945 F.2d 1482 (10th Cir. 1991)("Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision."). Upon review, however, the ALJ's question(s) were not improper. See, generally, Diaz v. Secretary of Health and Human Services, 898 F.2d 774 (10th Cir. 1990)(Court affirms Secretary's decision, despite claimant's contention that Secretary improperly discounted impairments such as the side effects of medication, headaches, blurred vision and poorly controlled seizures). It also should be noted that, on page 89 of the Record, the vocational expert -- who listened to Plaintiff's testimony -- said his opinion would not change even if (assuming arguendo) all of claimant's testimony was taken as true.*

SO ORDERED THIS 29th day of April, 1994.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CAROLYN KING,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary,

Defendant.

279
93-C-~~0179~~-E

ORDER

Plaintiff Carol King, a 46-year-old electrical motor winder who claims to be disabled as a result of a neck injury, appeals the Defendant Secretary of Health and Human Services' decision to deny her disability insurance benefits.[1] Upon review, the Court affirms the Secretary's decision, finding it is supported by substantial evidence.

I. Standard of Review

In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g).[2] The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A

[1] *As acknowledged by Plaintiff, this is her third application for disability insurance benefits. Res judicata forecloses any review of the first two applications. Consequently, the question on this appeal is whether she was disabled at anytime after November 1, 1988. Plaintiff's Brief at page 1 (docket #6).*

[2] *Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

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finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. ***Trimiar v. Sullivan***, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. ***Smith*** *v. Heckler,* 707 F.2d 1284, 1285 (11th Cir. 1985).[3]

II. Legal Analysis

The issue is whether substantial evidence supports the ALJ's decision that Plaintiff could return to work as an inspector, office helper and telephone solicitor. *Record at 25.*[4] The ALJ's decision was based, in part, by the following finding:

> **The claimant has the residual functional capacity to perform the physical exertional and nonexertional requirements of work except for the exertional inability to lift over 5 pounds frequently and 10 pounds occasionally, to sit over 6 hours in an 8-hour day, and to stand/walk over 6 hours in an 8-hour day, and the nonexertional limitations of the inability to do complex jobs, to do work involving jarring, repetitive motion of the upper body, or use of the neck except in a neutral position.** *Id. at 23.*

That finding ("Finding 5") is the gist of Plaintiff's appeal. Plaintiff contends that the limitations acknowledged by the ALJ in Finding 5 "significantly compromises her ability to do even the light and sedentary jobs that the ALJ found that she could perform." *Plaintiff's Brief at page 8.* Finding 5, the Plaintiff writes, "virtually eliminates not only the jobs

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[3] *When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or non disabled at any step, the review ends.* Gossett v. Bowen, *862 F.2d 802, 805 (10th Cir. 1988). In the instant case, the Secretary found Plaintiff was not disabled at step 5.*

[4] *The ALJ wrote: "Although the claimant's additional nonexertional limitations do not allow her to perform the full range of light work, using the above-cited rules [the grids] as a framework for decision-making, there are a significant number of jobs in the national economy which she could perform."* Record *at 25.*

identified by the vocational expert, but all other jobs that exist in reasonable numbers in the national economy." *Id. at 8.*

Upon review, the Plaintiff's argument fails. First, the fact that Plaintiff contends she is disabled simply because the ALJ found that she could not perform a full range of light or sedentary work is incorrect. The question for the ALJ is whether jobs exist for a Plaintiff with her precise impairments. To answer that question, the ALJ examined the evidence and found that Plaintiff could perform a full range of light work, except for the limitations in Finding 5. The ALJ then asked the Vocational Expert whether jobs existed based on the Finding 5 limitations. The Vocational Expert testified that Plaintiff could work in the aforementioned jobs. See, generally, *Trimiar* at 966 F.2d 1333 (10th Cir. 1992)("Vocational expert testimony is required to determine whether jobs exist for someone with the claimant's precise disabilities." (emphasis added)). Consequently, the ALJ did not procedurally err in this regard.[5]

Aside from the procedural question, Plaintiff's only remaining issue is whether substantial evidence supports the Secretary/ALJ's decision. Plaintiff, 46-years-old with an 11th grade education, testified that pain in her shoulders, neck, arms and hands kept her from working. *Record at 71.* She said she has sharp pains and aching. *Id.* She also testified that she can't "pick up anything, grip or hold anything for any length of time." *Id. at 72.*

The medical evidence, however, did not support Plaintiff's testimony. In November

[5] *The ALJ did not rely solely on the grids. He used them as framework for his decision. Id. at 1333 (If the grids reflect a finding of not disabled, they can be used only as a framework for determining what the claimant can still do in light of his impairments.) Also, see Findings 11, 12 and 13 on page 24 of the Record.*

of 1988, Plaintiff underwent a cervical myelogram. At that time, Dr. Sami Framjee, the Plaintiff's treating physician, stated that she should "gradually return to her normal occupational duties." Record at 353. Likewise, the opinion of Dr. Gerald Sutton, another treating physician, did not find Plaintiff to be disabled. *Id. at 361-368.*[6] In fact, neither Drs. Sutton or Framjee or any other physician found that Plaintiff was unable to work.

Another piece of evidence supporting the ALJ's decision was the testimony of Dr. Thomas Goodman, the Secretary's medical expert. Dr. Goodman did not examine Plaintiff but reviewed her medical records. Based on that review, he testified that Plaintiff could work with the limitations set forth by the ALJ. In addition, Dr. Goodman testified that Plaintiff's subjective complaints of pain could not be explained either psychologically or physiologically. *Id. at 84.*

The ALJ also relied, in part, on the Vocational Expert's testimony. The Vocational Expert, in response to the ALJ's hypothetical questions, stated that Plaintiff could work in some sedentary and light work level jobs. *Id. at 95.*

Given the foregoing, substantial evidence does support the ALJ's finding. While Plaintiff testified that she could no longer work, the ALJ found her allegations of inability to work and pain to be not credible. *Record at 23.* In addition, Plaintiff's treating physicians -- Drs. Framjee and Sutton -- did not conclude that their patient was disabled. In fact, Dr. Framjee stated that Plaintiff could return to work. Furthermore, the testimony from the medical expert and the Vocational Expert also supports the ALJ's decision. Therefore, the Secretary's decision is **AFFIRMED.**

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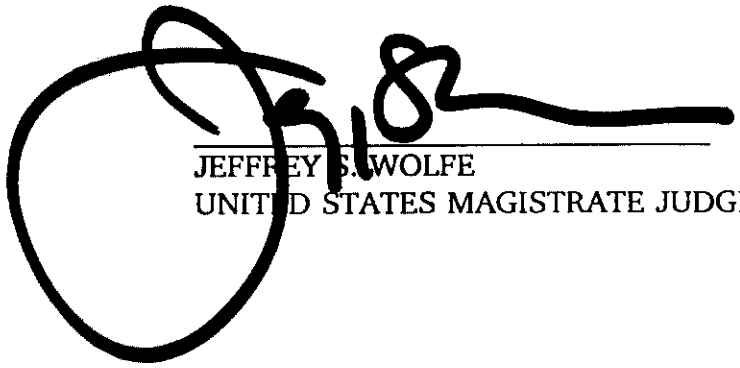
[6] *It also should be noted that Plaintiff, despite her complaints of pain, sought treatment from Dr. Sutton only twice in a two-year period from 1989 to 1991. That fact prompted the ALJ to question the Plaintiff's credibility on her pain complaints.* Record *at 21.*

SO ORDERED THIS 29th day of April, 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDY K. MORTON,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 92-C-481-E

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

In the case at bar, the ALJ made his decision at the fifth step of the sequential

[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

evaluation process.[2] He found that claimant had the residual functional capacity to perform the physical exertion requirements of work, except for occasionally lifting and carrying up to 10 pounds and frequently lifting and carrying more than 5 pounds with left nondominant upper extremity. He found that claimant had the residual functional capacity to perform the nonexertional requirements of work, except for work requiring him to use his left hand above shoulder level, or work which would require perfect visual acuity. He found that claimant was unable to perform his past relevant work which required him to work with both hands above his head.

The ALJ found that, although the claimant's additional nonexertional limitations did not allow him to perform the full range of light work, there were a significant number of jobs in the national economy which he could perform, such as machine operator helper, assembler, inspector, and food service worker. Noting that the vocational expert witness testified that 4,000, 1,500, and 20,000 of these jobs, respectively, exist in the State of Oklahoma, the ALJ concluded such jobs exist in very significant numbers in the national economy. Having determined that claimant was able to perform jobs that exist in significant numbers in the national economy, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) That the ALJ's decision that claimant could perform light work is not supported by substantial evidence.

(2) That the ALJ's finding that claimant's allegations of pain were not credible to the extent that they precluded work was in error.

(3) That the ALJ's analysis of the vocational expert's testimony erroneously held that the claimant could perform light work.

It is well settled that the claimant bears the burden of proving his disability hat prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The ALJ found that the medical evidence shows that the claimant is status post non displaced fracture greater tubercle, well healed without medically determinable residuals; status post frozen shoulder and/or impingement syndrome, left shoulder, surgically corrected on June 28, 1989; status post decompression left shoulder, November 12, 1989; status post decompression left shoulder with secondary avulsion, middle portion, deltoid muscle, completed on May 17, 1990; and has best corrected visual acuity of 20/30 left and 20/40 right.

The medical records show that from June 27, 1990, when he filed his application for disability benefits until his hearing before the ALJ, claimant never complained of any impairment except problems resulting from a left shoulder injury in November of 1988. However, at the hearing he stated he was "getting ready" to see his doctor because his back was hurting after he mowed the yard (TR 40) and as a result he was having difficulty "walking and lifting and stuff." (TR 40). He also claimed he had "eye problems" and was

going to see an eye specialist concerning the blurring when he reads (TR 42), had become aware a "month ago" that he had high blood pressure (TR 43), and had weakness in his hand (TR 53). These complaints were elicited by extremely leading questions asked by his attorney (TR 40, 42, 43, 52-53), as noted by the ALJ (TR 11). However, in his brief to this court on appeal, claimant only mentions that he has had a back injury, three shoulder surgeries, and grip problems in his right hand (Plaintiff's Brief, pg. 4). Claimant offers no medical records to verify the back and grip problems and hypertension, and an eye examination on April 11, 1991 revealed he had corrected visual acuity in his right eye of 20/30+ and left eye of 20/40-. (TR 178).

The medical records and notes of Dr. M.R. Workman show that claimant suffered a rotator cuff tear in his left shoulder in November of 1988, which was treated conservatively until June 27, 1989, when a decompression was performed to alleviate pain (TR 129-131, 133-142). By August 3, 1989, Dr. Workman reported:

> Mr. Morton's wounds look quite good now he has started about a week ago doing his range of motion exercises again today he exhibits approximately the following range of motion: forward flexion 90° abduction 80°, adduction 20°, external rotation 20°. Those are the only directions tested although he seems to be working hard and playing hard I feel that because of the loss of time we need to add some physical therapy to his regimen so will set him up for physical therapy for three times a week for two weeks and see him back at the end of that time for further evaluation. (TR 128) (emphasis added).

On August 31, 1989, the doctor said:

> Mr. Morton continues to improve. He can move his shoulder in a full range of motion now. A little more rapidly than he could the last time so it obviously doesn't hurt as badly. I'm going to let him stop his therapy now but he does need to continue his therapy at home. He and I discussed this and we

will see him back here in two weeks. (TR 128).

On October 6, 1989, Dr. Workman stated:

> Patient has been doing very well he says. He has been able to do quite a bit including even some shoveling but this morning he had to dig under his house, he had a pipe broken and he has markedly increased his symptomatology. The pain is located right over the anterior aspect of the shoulder and he even has a small knot there in the wound anteriorly, it could be an old stitch I am really not sure what it is. At any rate he feels that he had done very well up until this morning but he does not have a normal range of motion as yet. He says he is working on it. I'd like to seek him back in 3 weeks, hopefully he'll be doing well at that time and I can check his range of motion myself. (TR 127) (emphasis added).

On November 3, 1989, claimant had additional surgery and an osteophyte was removed. (TR 145-153). By December 1, 1989, Dr. Workman reported:

> Mr. Morton is doing well. He tried raking some leaves the other day and this made his shoulder sore for a couple days and I cautioned him not to do this type of thing. He has actually a good range of motion again already but it is a painful range of motion. He is 4 weeks post op and I told him not to overdo. Go ahead and do gentle range of motion exercises and return again in 3 weeks. (TR 127) (emphasis added).

By December 21, 1989, Dr. Workman found:

> Mr. Morton does move his arm more freely now but still complains of pain. All in all he is improving and making progress. His wife won a 6 month membership fee for herself and her husband at a local spa and I told him that it was alright to start lifting weights but to stick with the 1 pound, 2 pound, and 5 pounds at present on this shoulder. See him back again in 2 weeks. (TR 127) (emphasis added).

On January 5, 1990, the doctor reported that claimant had been doing well until he changed a flat tire and "as he was breaking loose the lug nuts he pulled hard on the lug wrench and felt a snapping sort of feeling in the shoulder so he may have torn loose

something but we'll just have to wait and see if he did. I told him he could start some muscle building exercises now." (TR 126).

On January 19, 1990, claimant told the doctor he was working out vigorously each day with a five pound weight, in spite of the burning sensation he felt in his shoulder. (TR 126). On May 17, 1990, claimant had a third surgery and the "old tear in the deltoid muscle [was] repaired." (TR 158). He started a Neer exercise program on June 7, 1990 (TR 125). By August 1, 1990, he was having less pain and had "160° of abduction which is excellent." (TR 124). He had not been going to physical therapy because he could not afford the gas, but Dr. Workman said: "He would be able to return to work now except that all of his work is overhead . . . ." (TR 124). On August 15, 1990, he told the doctor he had to move and "he had no help at all" with the move (TR 124). By October 22, 1990, the doctor stated:

> The Vocational Rehab. nurse came with him today, however she has not been authorized as yet to do any vocational evaluation. I told her that I would talk to the insurance company myself. I didn't understand that she wasn't allowed to go ahead with helping him to get back to employmeny [sic] and therefore I sent the letter to her rather than the insurance company and I will talk to the insurance company. (TR 123).

On December 26, 1990, Dr. Workman reported: "Mr. Morton says that he has been told that he needs a release to return to work and this is no problem from my standpoint. I will be glad to give him one. He says he is going to see his lawyer now and he will ask his lawyer for advice." (TR 168). In a letter dated February 20, 1991, Dr. Workman wrote that he had last seen claimant on December 26. He reported:

> [a]t that time he had good range of motion except for only 90 degrees of abduction. He was having less pain and tenderness.

> By this time it was felt that he had reached maximum medical improvement. Attempts were being made to have some type of occupational training authorized in order to allow him to learn a new trade since it was not felt that he had the capacity in the left upper extremity to pursue his old occupation. There was some question as to whether he should be released to return to work before his training or wait until his training was over.

He had not heard from claimant again.

Claimant's testimony at the hearing was not reliable. He said his only activity is "sitting," and his hobby was "fishing mostly." (TR 40). When asked how often he fishes, he said "[n]ot often enough." (TR 40). He said he spends time "fooling with" his son, and when asked what kind of things he does with his son, he said: "I play baseball and stuff like that, watch him." (TR 41). However, when asked about this statement later, he said: "No, I wasn't playing baseball. I don't even have a baseball glove." (TR 51). Then the testimony continued:

> Q Well, have you played any baseball?
>
> A No, sir.
>
> Q Why did you -- why did you say you were playing baseball?
>
> A Baseball cards mostly.
>
> Q Beg your pardon?
>
> A Picking up baseball cards mostly with him. (TR 51).

When the subject came up again later at the hearing, the testimony went as follows:

> Q Well, now on this playing ball, you don't -- you haven't played ball with your son or done anything like that?

A No, no, sir.

Q Why'd you say you had?

A I just didn't think you'd all -- maybe think I was sitting on the couch all the time which I have been. (TR 56).

Claimant's statements concerning his right hand weakness were suspect:

Q What problems have you run into in this respect?

A Eating, watching television, anything, it's just --

Q Well, you don't use your hands much to watch television, do you?

A No, I don't guess.

Q All right, but there are other things I presume that you unconsciously use both hands for?

A Yes, sir

Q Do you run into any problems then?

A I don't guess.

Q Sir?

A I don't guess, just small stuff of any kind. (TR 54).

When asked about his workouts at a health club, as reported by Dr. Workman, he testified as follows:

Q What, you were working out pretty - there in January, what kind of -- or January of last year, what, what kind of work were you doing then, work-outs?

A What, working out?

Q Uh-huh, did you belong to a club or something?

A No, no just rehab type stuff like that, picking up five pounds of weight, just setting it down, just keeping the arm loose is all I was doing.

Q Okay.

A Stretching and things. (TR 42).

Claimant testified that he takes his wife to work each day, but then claimed he has "no place to go" during the day with the vehicle (TR 56). He said his only activity is "sitting," although just before that he said he'd hurt his back mowing the yard the night before. (TR 40).

Claimant argues that the ALJ ignored the vocational expert's conclusion that there were no light jobs that did not require a person to stand at least six hours a day. However, the expert testified as follows:

Q If a person did have a restriction of using their hands overhead, this background, this work background and GED, would there be jobs that that person might be able to perform?

A There would be jobs that would be at an entry level or unskilled level, yes.

Q And what would some of those be?

A Well, there would be the jobs as a machine operator/helper which would be classified at a light exertional level. There's approximately 4,000 of those in Oklahoma. There would be various types of assembly jobs at a sedentary level. There would be 3,000 which is primarily bench assembly type of work. There would be assembly jobs at a light exertional level, approximately 4,000. The job of inspector

would be 750 of those in the sedentary level, 1500 at a light level; food service worker at a light exertional level, there's 20,000 of those in Oklahoma.

Q If, if a person were restricted to lifting not over five pounds with one hand, there wouldn't be a restriction on the other hand, would they -- the dominant hand would be capable of more weight, would this prevent them from doing these jobs?

A No, there'd be a reduction in the number, but it wouldn't preclude the performance of, of many of them.

Q What kind of reduction are you talking about?

A There wouldn't be any reductions on a sedentary levels. At the light exertional level on the assembly job, there'd probably be a reduction of 25 percent from that 4,000. The machine operator/helper, there'd probably be a reduction of about 50 percent. Food service worker, there'd be a reduction of 25 percent on that. Many of these jobs are, are classified as, as light, not because of the lifting component but because the person is required to be on their feet generally six -- four to six hours to seven hours out of the day.

Q Would any of these jobs require extremely acute vision or just average vision would be essential?

A Average vision would be adequate on the machine operator, the food service worker. On some of the assembly jobs and some of the inspector jobs, it would require good, close vision. There'd probably be a reduction of 50 percent on, on those for that.

Q Do these jobs exist in significantly larger numbers in the regional or national economies?

A Yes. (TR 58-59).

Claimant's attorney than asked the following hypothetical:

> Q Doctor, if the medical testimony should establish that this man is not able to stand more than six hours a day, would your opinion change any as to whether or not he could do these jobs?
>
> A Yes, it would, in that the light jobs would -- generally, the ones that I named would require that the individual be able to stand at least six hours. It would not affect the jobs that I gave at the sedentary level. (TR 59-60).

The vocational expert had listed several light jobs that were sedentary, such as assembly line, and there is absolutely no evidence that claimant could not perform those jobs. In fact, the only evidence that claimant cannot stand six hours a day are claimant's self-serving statements and a physical capacities evaluation completed by Dr. Workman on April 12, 1991 that said claimant could only stand one hour of an eight-hour day (TR 177). In the same evaluation, Dr. Workman stated that claimant could lift and carry 6-10 pounds occasionally and use his hands for repetitive gasping and fine manipulation (TR 177). Claimant testified that Dr. Workman had said he could only lift five pounds now (TR 41). There is nothing in the record to show that claimant cannot lift and carry even more weight with his right arm.

There is substantial evidence in the record to support the ALJ's conclusion that "claimant grossly exaggerates his symptoms to the Administration and is far more physically active than he is willing to admit." (TR 21). There is also substantial evidence to support his conclusion that claimant can perform light work, except for work requiring him to use his left hand above shoulder level, and that there are a significant number of jobs in the

national economy that he can perform.

The ALJ's conclusion that claimant does not suffer disabling pain is also substantiated by the record. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

> [W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "'[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.'" Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a shoulder problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. While this court need not give absolute deference to the ALJ's conclusion on this matter (TR 21), it does so in this case. While claimant undoubtedly suffers some pain in his left shoulder, one need not be pain free in order to have the capacity to engage in gainful activity.

Finally, the ALJ did not misinterpret the vocational expert's testimony that claimant's inability to stand for six hours a day would not affect the sedentary jobs that he could do. The vocational expert only ruled out jobs requiring a great deal of standing.

As the ALJ noted, the doctor's notes that claimant has been able to dig, shovel,

change a flat tire, rake leaves, and move his household without help is persuasive that he can engage in sedentary light work on a sustained basis. (TR 22).

The Secretary's decision that claimant is not disabled is supported by substantial evidence and is a correct application of the pertinent regulations. It is affirmed.

Dated this 29th day of April, 1994.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

N:Morton.or

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BOVAIRD SUPPLY COMPANY
a Delaware corporation,

Plaintiff,

v.

TUBULAR SPECIALTIES, INC.,
a Texas corporation;
YEGUA PRODUCTION COMPANY,
a Texas corporation;
and THOMAS D. GHOLSON, an
individual,

Defendants.

CASE NO. 93-C-254-B

JUDGMENT

Pursuant to the Order entered simultaneously herein, granting summary judgment in favor of Plaintiff, The Bovaird Supply Company, and against the Defendants, Tubular Specialties, Inc., Yegua Production Company, and Thomas D. Gholson, in the amount of $1,711,764.22, with 15% interest thereon from April 1, 1991, until the date of judgment, and 15% attorneys fees, judgment is hereby granted in favor of Plaintiff, The Bovaird Supply Company, and against the Defendants, Tubular Specialties, Inc., Yegua Production Company, and Thomas D. Gholson, in the amount of $1,711,764.22, with 15% interest thereon from April 1, 1991, until the date of judgment, and 15% attorneys fees, plus interest from and after said judgment at the rate of 5.02% per annum until paid.

Costs are assessed against Defendants if timely applied for

pursuant to Local Rule 54.1.

DATED this 29th day of April, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAYNE MAYFIELD,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 93-C-1023-B

ORDER

Before the Court is Defendants' motion to dismiss or for summary judgment filed on March 16, 1994. The Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C. The Court also notes that the Plaintiff has failed to notify the Court and Defendants' counsel of his current address.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss or for summary judgment [docket #13] be granted and that the above captioned case be **dismissed without prejudice.**

SO ORDERED THIS 29 day of apr., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT JONES Plaintiff, vs. LINDA LAZELLE, et al Defendants.	)	No. 94-C-278-B ✓

ORDER

IT IS HEREBY ORDERED that this action be **dismissed** for failure to submit the complaint on the court-authorized form as set out in the March 31, 1994 order [docket #3].

SO ORDERED THIS 29 day of April, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE